POLYGRAM RECORDS SDN. BHD.

v.

HILIARY & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CODE NO. 02-22-52-88]
8 JUNE 1988

CIVIL PROCEDURE: *Interim injunction - Principles to be applied - Whether Court will compel performance of a negative agreement - Whether damages an adequate remedy - Section 55 Specific Relief Act 1950.*

CONTRACT: *Clause in contract stipulating irrevocable option to renew upon expiry - Whether written notice of exercise of option necessary.*

The 2nd, 3rd and 5th defendants together with 2 others who were the original group members of SEARCH entered into an agreement with the plaintiff on 12 June 1985 whereby for the next 2 years the group undertook to perform musical works for the plaintiff exclusively which the plaintiff undertook to distribute and sell. The plaintiff alleged that the 1st to 5th defendants had breached the agreement by recording with other companies which was to be distributed by the 6th defendant, a rival company. The plaintiffs applied for an interim injunction against the defendants.

The 1st to 5th defendants argued that the contract no longer existed between the parties as the contract which expired on 11 June 1988 had not been extended by the lawful exercise of the option to renew as no written notice of the plaintiffs intention to extend the contract had been given to the 1st to 5th defendants. They further argued the Court should not grant the interim injunction as the contract is essentially for personal services and that damages would be an adequate remedy.

Held:

[1] Under the terms of the agreement there was no necessity to give written notice of the intention to exercise the option to renew the contract for a further period of two years and further as the 1st to 5th defendants had acknowledged the existence of the contract after the purported expiry of the contract, a valid contract therefore existed.

[2] Although the contract was one for personal services, the plaintiffs were exercising their rights to have the undertakings given by the 1st to 5th defendants enforced and the Court is not prevented from enforcing negative agreements.

[3] The quantification of damages was not possible on the peculiar facts of the case and therefore was not an adequate remedy.

[Interim Injunction granted.]

Legislation referred to:
Specific Relief Act 1950, s. 55

For the plaintiffs - S.F. Wong (Ramakrishnan with him); M/s. Shearn Delamore & Co.
For the defendants - Muhd. Shafee Abdullah (Christina Kow with him); M/s. Shafee & Co.

JUDGMENT

Siti Norma Yaakob J:

The 1st - 5th defendants in this suit are popular recording artistes belonging to a group called "The Search". On 12 June 1985, the 2nd, the 3rd and the 5th defendants, together with 2 others, (who made up original members of the "The Search"), entered into an agreement with the plaintiffs, a music and sound recording company, whereby for the next 2 years expiring on 11 June 1987, the group undertook to perform musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell.

Towards the end of 1985, the 1st and 5th defendants replaced 2 original members of the group and this substitution appears to have had the consent of all parties concerned.

The 6th defendant is a rival company of the plaintiffs, engaged in the same business of recording and distributing musical works.

In this suit, the plaintiffs allege that the 1st - 5th defendants had breached their undertakings under the agreement by recording their musical works with individuals, firms and companies, particularly their own company called Go Search Sdn. Bhd. and with the 6th defendant, thereby depriving the plaintiffs of the profits they would have earned had there been no breach and for this very reason, they had applied for an interim injunction principally,

(1) to restrain the 1st - 5th defendants from holding themselves out as being free to enter into any recording contract with any other recording company, except the plaintiffs.

(2) to restrain the 6th defendant, their servants and agents from entering into any distributorship agreement with the 1st - 5th defendants for the purpose of distributing their musical works recorded by Go Search Sdn. Bhd. or by any other company.

Whilst not disputing that they had breached their undertakings under the contract, nonetheless the 1st - 5th defendants had raised the following objections at the hearing.

(1) The contractual relationship between them and the plaintiffs no longer exists.

(2) Even if there is one, the Court should be reluctant to grant an injunction as the contract is a contract of or for personal service.

(3) Damages would be a more appropriate remedy.

It is the 1st - 5th defendants' contention that the contract had lapsed under Clause 6 of the agreement by effluxion of time, as there was no effective option exercised by the plaintiffs under Clause 6(ii) to treat the agreement as still subsisting until 11 June 1989. They further maintain that the plaintiffs should have expressed their intention to exercise the option by communicating such intention to them in writing and since this was not done, there are no contractual obligations binding them to each other.

Clause 6(ii) expressing the term to extend the agreement for a further 24 months after its expiry on 11 June 1987, speaks of an irrevocable option to renew and the only condition attached to the exercise of such an option is that the plaintiffs must have observed and performed all their obligations under the agreement before they can exercise such an irrevocable option. The clause does not mention that in the exercise of such an option, the plaintiffs must communicate their intention to do so in writing to the 1st - 5th defendants and the fact that the parties had agreed that such an option was an irrevocable one, makes it more understandable that no express intention was intended or envisaged.

The 1st - 5th defendants are fully aware that they are still bound by their contract to the plaintiffs untill as late as 10 February 1988, they had acknowledged that the contract still subsists as can be seen from a newspaper report appearing at p. 56 of the Exhibits attached to the plaintiffs' affidavit in support of their application for the interim injunction. Added to this is the undisputed fact that even after 11 June 1987, the group had continued collecting their royalties from the plaintiffs. Since there is no evidence that the plaintiffs had failed to observe their obligations under the contract, I had concluded that there had been a proper and effective exercise of the option by the plaintiffs and the 1st - 5th defendants are still bound by their undertakings not to perform for others, except the plaintiffs.

The 1st - 5th defendants also submitted that the contract is void as being restrictive Clause 6(v) prevents them from performing world wide. Reading Clause 6(v) in its entirety, it is clear that, that clause becomes operative only when the contract is terminated. In this case, it is quite premature to rely on Clause 6(v) as I have already held that the contract is still subsisting.

Admittedly the contract is one for personal service but what the plaintiffs are trying to enforce is their right to have the undertakings given by the 1st - 5th defendants enforced. It is not that the plaintiffs are preventing them from earning a livelihood altogether but that they should not do so with others as their livelihood is already guaranteed by their undertakings in the contract. To that extent, I consider that the Court is not prevented from exercising its discretion to grant the interim injunction to compel the performance of a negative agreement asked for by the plaintiffs although it cannot compel specific performance of the affirmative agreement to perform. (See s. 55 of the Specific Relief Act 1950).

Lastly there is the issue as to whether damages would be a more adequate remedy under the circumstances of this case. It must not be forgotten that the 1st - 5th defendants are members of a singing group of pop music and that sales of their recordings depend largely on their popularity. Right now they are at the height of their popularity and sales are expected to be brisk and rising. Under Clause 6(iii) of the agreement, it is specified that they are expected to make 10 sound recordings with the plaintiffs during the period 1985-87 and 10 more during the option period with a possibility of extra performances being arranged and performed during the relevant periods. Thus bearing in mind the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, it is clearly understandable that quantification of damages is not possible and on balance I had concluded that on the peculiar facts of this case, an interim injunction should issue in the manner asked for by the plaintiffs with the usual undertaking as to damages by the plaintiffs in the event that the defendants should succeed in having it set aside later. Here I need to make it clear that the interim injunction should be until further order as that was not specifically stated by me when making the order.

Also found at [1988] 2 CLJ 629